U.S. Department of Justice

Immigration and Naturalization Service

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PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536

[redacted]

FEB 27 2003

File: EAC 00 272 53378 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen (the motion). The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is an Italian restaurant and pizzeria. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The petitioner has appeared in these proceedings through a volunteer who did not file any notice of appearance as an attorney or representative (Form G-28) or written declaration respecting remuneration and who, apparently, has no standing. 8 C.F.R. § 292.1(a)(1)-(4). Nonetheless, all representations will be considered.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the

Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is March 13, 2000. The beneficiary's salary as stated on the labor certification is $476 per week or $24,752 per year.

In a request for evidence dated November 18, 2000 (RFE 1), the director requested further evidence of experience as a foreign food specialty cook, both for the hours worked weekly and in the capacity of a foreign food cook. In a request for evidence dated February 14, 2001 (RFE 2), the director required documentary evidence of the beneficiary's work in Italy at age 14 and, also, the petitioner's 2000 federal tax return to show the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present.

On July 9, 2001, the director denied the Petition for Immigrant Alien (I-140) because it did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence (director's decision). The director's reasoning considered both the net income with depreciation and the net current assets, by definition, the difference between current assets and current liabilities. The AAO determined that the director properly considered net income and net current assets and found them insufficient for the proffered wage, $24,752 per year.

The petitioner objected on appeal and on motion that the proof of the ability to pay applied only to the weekly wage of $476. The petitioner reasoned, therefore, that the growth in sales, total assets, and salaries paid from 1998 to 2000, with cash on hand at the end of 2000, $12,270, sufficed to prove the ability to pay the proffered wage.

The appeal and motion further claim that ordinary income shows increased growth. It does not. For the years 1998-2001, it is, respectively, $7,246, $4,725, $11,218, and $6,044. The appeal and motion insist on cash on hand, though liabilities overtake it. That is, net current assets were unstated in 1998, deficits of ($11,806) in 1999 and ($541) in 2000 at the priority date, and $9,375 in 2001, less than the proffered wage.

Contrary to emphatic assertions on appeal and in the motion, the pertinent regulation specifically mandates annual reports, federal tax returns, or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2), *supra*.

The financial ability to cover the annual salary applies at the priority date continuing until the beneficiary obtains lawful permanent residence. *Id.* The regulation logically points only to

annualized measures.

The appeal and motion advocated the use of income and assets and attacked the use of the expenses and liabilities incurred to produce them. The assertion complained, without citation:

> [The petitioner] submitted three-years of partnership returns, reflecting a viable business with steady growth, increased sales and net profit and available cash on hand in each of the years….
>
> The mechanical approach of gross income, less depreciation and expenses and the reaching of the conclusion that the ordinary income remaining is a sum less than the "annual wage," to deny a petition, was also attacked as flawed and unacceptable, and not supported by the law.

In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

In the light of these authorities, the petitioner maintains two (2) offers of proof on appeal and in the motion. First was a public accountant's letter dated July 25, 2001 (Caryl opinion). It proposed that the father would transfer his interest in the partnership to his son and that the father's guaranteed payment (draw) of $20,800 would be applied to hire a full-time, experienced individual, namely, the beneficiary, to assist in food preparation and management of the staff. The record documented no particulars of the transfer of interest, no contract to abate the

draw, and no evidence that any employees were replaced at the priority date of the petition. The proposal had no evidentiary value.

The motion insists that the partner father is leaving the business and questions, "... Is not this factor, very, very relevant, yet ignored entirely in the denial? Why?"

Simply, the federal tax return for 2001, as submitted with the motion, documents in Schedule K-1 that the partners are receiving the usual draw for the years from 1998-2001. Funds once applied to another purpose are not available to apply to the proffered wage.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I & N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

The Caryl opinion concluded that it would be unjustified to base the hiring of additional employees on the net profits of a business. That expert opinion was said to bind the AAO, but it does not rise to the level of a precedent decision.

While 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The same lack of status as a precedent decision and of evidentiary value applies to the second expert opinion, a letter dated August 7, 2001 from another accountant (Mauro opinion). It listed many reasons to hire an extra employee, all of which might increase revenue enough to cover the compensation of a new employee. The Mauro opinion argued that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. It concluded that the petitioner "is a viable business which could hire an additional person without jeopardizing any other expenses incurred by the business."

The Mauro opinion has not, however, provided any standard or criterion for the evaluation of such earnings, such as the beneficiary's reputation to increase the number of customers. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers. In short, the offer of proof in the Mauro opinion did not document the beneficiary's impact on any of the list of reasons to hire a new employee.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The motion and opinion letters advise that the beneficiary will replace less efficient workers. The record does not, however, name these workers, state their wages, or provide evidence that the petitioner replaced them. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

After a review of the federal tax returns, opinion letters, appeal and motion briefs, and employee journal submitted on appeal and on motion, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The appeal and motion, in the Caryl opinion, went beyond the scope of the director's decision and stated:

> Both partners work excessive hours and can not continue this daily routine. The father is in the process of transferring his percentage of the business to his son…. The loss of a partner would certainly require the business to hire a full-time experience individual to assist in food preparation and management of the staff. Massimo Failla, with the approval of the U.S. Dept. of Justice, intends to hire [the beneficiary]….

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date is March 13, 2000 in this case.

The Form ETA 750, in block 14, detailed the minimum education,

training, and experience to perform the job of a foreign specialty cook. It specified two years of experience in the job offered. The Form ETA 750 included no managerial duties such as the Caryl opinion injects.

In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Though not a basis of this decision, the petitioner did not establish that the Form ETA 750, certified by the Department of Labor, authorizes managerial employment. The Form ETA 750 states a different capacity than the one in which the petitioner may intend to employ the beneficiary. The petitioner is not in compliance with the terms of the Form ETA 750 and has not established that the employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

The beneficiary must engage in the position described on the Form ETA 750 and applicable to this I-140. As stated in *Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg. Comm. 1966):

> It does not appear to have been the wish of the Congress to award such a preference to an alien who, although fully qualified as member of the professions, had no intention of engaging in his profession or, at least, in a related field for which he was fitted by virtue of his professional education or experience.

The petitioner could have clarified or changed its requirements before the Form ETA 750 was certified by the Department of Labor. Since that was not done, it is too late on appeal for the petitioner to assert different ones. On appeal and motion, the Caryl opinion proposes an entirely different field of endeavor.

Matter of Ho, 19 I&N Dec. 582 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence

pointing to where the truth, in fact, lies, will not suffice.

Moreover, the responses to RFE 1 and RFE 2 may establish less than two (2) years of both full-time experience and of service as a foreign food specialty chef. Though not now a basis for this decision, the failure to present complete evidence in response to RFE 1 and RFE 2 would preclude presentation in further proceedings.

The director requested evidence in accord with 8 C.F.R. § 204.5(g)(2). Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Service. *Matter of Soriano*, 19 I & N Dec. 764, 766 (BIA 1988).

For these additional reasons, though not grounds of this decision, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.